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Public Prosecutor v Lim Poo Teck

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(LB)-519–12 OF 2021
HADHARIAH ISMAIL, SEE MEE CHUN AND AZMI ARIFFIN JJCA
11 DECEMBER 2023

C *Criminal Law — Murder — Defence — Unsoundness of mind/insanity — Whether onus was on accused to prove defence of unsoundness of mind/insanity on balance of probabilities during defence's case — Whether trial court erred in determining at close of prosecution's case that accused was of unsound mind and then acquitting and discharging him of the charge — Whether issue of accused's* D *state of mind at material time could only have been determined at close of defence's case after evidence of both prosecution and defence had been evaluated — Whether trial judge at close of prosecution's case erred in rejecting evidence of prosecution's medical expert witness that accused knew nature and consequences of his actions when murder was committed — Whether once trial judge expressly found accused* E *had caused the death stated in the charge, he was duty-bound under s 180 of Criminal Procedure Code to have called on accused to make his defence — Whether if accused had not offered any evidence and had remained silent, he would have been convicted for failing to rebut prosecution's evidence*

F The respondent ('Lim') was charged in the High Court for killing his sister ('the deceased') in her house on the evening of 21 February 2020. The deceased's son ('SP2') testified that while he was in the house that evening, Lim suddenly appeared with an axe and attacked the deceased with it, causing her to sustain severe wounds on her head and neck from which she died. After the attack, G Lim, armed with an axe and a *parang*, chased SP2 and a group of persons who had gathered to see what the commotion was about, from the scene of the crime until the vicinity of a nearby police station. SP4, who was on guard duty at the police station, testified that he saw Lim chasing the group into the station's compound while behaving in an aggressive and threatening manner as H if he was amok. A medical report produced at Lim's trial revealed that he was receiving treatment at a hospital for schizophrenia from 1995–1998. When he was charged with the deceased's murder, the trial court ordered Lim to undergo observation at a mental hospital. A medical report from the said hospital later certified that Lim was fit to stand trial and to defend himself. Lim claimed trial I when the charge was read out and explained to him. The psychiatrist ('SP7') who had examined Lim at the mental hospital testified during the prosecution's case that although Lim had a history of schizophrenia, at the time when he attacked the deceased he was aware of the nature and consequences of his actions and knew that what he was doing was either wrong or contrary to law.

SP7 also testified that from the CCTV recordings that she viewed, Lim did not appear to be confused after he had attacked the deceased. After the prosecution closed its case, the trial judge acquitted and discharged Lim without calling for his defence on the ground that he was suffering from unsoundness of mind. Pursuant to s 348 of the Criminal Procedure Code ('the CPC'), the trial judge ordered Lim to be sent to a mental hospital for further treatment. Although the trial judge expressly found that Lim had caused the deceased's death, he not only did not call for Lim's defence but rejected SP7's opinion that Lim was aware of what he was doing when he attacked the deceased. The judge took the view that SP7's opinion was 'not supported by sound premises'. The judge held that the prosecution had not proven a prima facie case against Lim and that, on the contrary, its evidence as a whole proved on balance of probabilities that Lim was of unsound mind at the material time. In the instant appeal, the prosecution assailed the trial court's decision, submitting that under s 180 of the CPC, the trial judge was duty-bound to call for Lim's defence to the charge. The prosecution submitted that it was premature for the court at the end of the prosecution's case to determine whether or not Lim was of unsound mind when he committed the offence as the onus of proving that defence on balance of probabilities was on Lim during the defence stage of the trial. The prosecution also submitted that there was no valid basis for the trial judge to have rejected SP7's opinion of Lim's state of mind at the time the offence was committed.

Held, unanimously allowing the appeal, setting aside Lim's acquittal and discharge and ordering the trial court to call for and hear Lim's defence to the murder charge:

(1) Having found that the charge of murder had been established by the prosecution, it was incumbent upon the trial judge to have directed Lim to state his defence. The failure to do so rendered the trial judge's ultimate decision fatally flawed (see para 21).

(2) It was premature for the trial judge to have dealt with the medical evidence and then to have ordered Lim's acquittal at the close of the prosecution's case. The judge should have continued with the trial and heard the defence's version. By primarily focusing on SP7's expert opinion and the factual evidence as to the circumstances leading to the deceased's death — which led to his conclusion thereon — the trial judge committed a serious error of law warranting appellate intervention (see para 21).

(3) For Lim to have earned an acquittal, the trial judge, armed with the facts, should have considered and evaluated from all angles whether by reason of medical insanity, Lim was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. This could only have been determined at the end of the trial after the defence had

given evidence and closed its case. If Lim had elected to remain silent and call no evidence, he would have been convicted pursuant to s 180 of the CPC as the prosecution's evidence would not have been rebutted (see paras 22–23).

(4) At the prosecution stage, expert medical opinion assumed little value or significance as the question of whether Lim was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law was a matter to be inferred from the proved facts and circumstances and not from expert medical opinion. Legal insanity was not for the medical witnesses to decide, however eminent they were. That onus was upon the defence to satisfy the court on balance of probabilities. It was purely a question of fact which rested upon the substratum of oral evidence, the credibility of which was entirely for the trial judge to determine after the close of the defence's case with the aid of the medical evidence (see para 24).

(5) Under s 84 of the Penal Code, it was only legal insanity according to the legal test — and not merely the mental state of an accused person according to the medical test — that exempted a person from criminal responsibility. The specie of insanity addressed by s 84 was that which impaired the cognitive faculties of a person. Its nature and extent must make the offender incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. The burden of proving the defence of insanity/unsoundness of mind rested on the person raising it and the standard of proof was on a balance of probabilities (see para 16).

[Bahasa Malaysia summary

Responden ('Lim') telah dituduh di Mahkamah Tinggi kerana membunuh kakaknya ('si mati') di rumahnya pada petang 21 Februari 2020. Anak lelaki si mati ('SP2') memberi keterangan bahawa semasa beliau berada di dalam rumah petang itu, Lim tiba-tiba muncul dengan kapak dan menyerang si mati dengannya, menyebabkan beliau mengalami luka parah di kepala dan leher yang menyebabkan beliau meninggal dunia. Selepas serangan tersebut, Lim yang bersenjatakan kapak dan parang mengejar SP2 dan sekumpulan orang yang berkumpul untuk melihat apakah kekecohan tersebut, dari tempat kejadian sehinggalah di sekitar balai polis berhampiran. SP4, yang bertugas di balai polis, memberi keterangan bahawa beliau melihat Lim mengejar kumpulan tersebut ke perkarangan balai sambil berkelakuan agresif dan mengancam seolah-olah beliau mengamuk. Laporan perubatan yang dikemukakan pada perbicaraan Lim mendedahkan bahawa beliau sedang menerima rawatan di hospital bagi skizofrenia dari 1995–1998. Apabila beliau dituduh atas pembunuhan si mati, mahkamah perbicaraan mengarahkan Lim menjalani pemerhatian di hospital mental. Laporan perubatan dari hospital tersebut kemudiannya mengesahkan bahawa Lim layak untuk dibicarakan dan

membela diri. Lim memohon dibicarakan apabila pertuduhan dibacakan dan dijelaskan kepadanya. Pakar psikiatri ('SP7') yang telah memeriksa Lim di hospital mental memberi keterangan semasa kes pendakwaan bahawa walaupun Lim mempunyai sejarah skizofrenia, pada masa beliau menyerang si mati, beliau menyedari sifat dan akibat daripada tindakannya dan tahu bahawa apa yang beliau lakukan adalah salah atau bertentangan dengan undang-undang. SP7 turut memberi keterangan bahawa daripada rakaman CCTV yang dilihatnya, Lim nampaknya tidak keliru selepas beliau menyerang si mati. Selepas pihak pendakwaan menutup kesnya, hakim perbicaraan membebaskan dan melepaskan Lim tanpa memanggil pembelaannya atas alasan bahawa beliau tidak sempurna akal. Menurut s 348 Kanun Tatacara Jenayah ('KTJ'), hakim perbicaraan mengarahkan Lim dihantar ke hospital mental untuk rawatan lanjut. Walaupun hakim perbicaraan secara jelas mendapati Lim telah menyebabkan kematian si mati, beliau bukan sahaja tidak memanggil pembelaan Lim tetapi menolak pendapat SP7 bahawa Lim sedar apa yang beliau lakukan ketika beliau menyerang si mati. Hakim mengambil pandangan bahawa pendapat SP7 'tidak disokong oleh premis yang kukuh'. Hakim memutuskan bahawa pihak pendakwaan tidak membuktikan kes prima facie terhadap Lim dan sebaliknya, keterangannya secara keseluruhan membuktikan berdasarkan imbangan kebarangkalian bahawa Lim tidak sempurna akal pada masa itu. Dalam rayuan semasa, pihak pendakwaan membantah keputusan mahkamah perbicaraan, dengan mengemukakan bahawa di bawah s 180 KTJ, hakim bicara bertanggungjawab untuk memanggil pembelaan Lim atas pertuduhan. Pihak pendakwaan berpendapat bahawa ia adalah terlalu awal untuk mahkamah pada akhir kes pendakwaan untuk menentukan sama ada Lim tidak sempurna akal atau tidak apabila beliau melakukan kesalahan tersebut kerana beban untuk membuktikan pembelaan tersebut atas imbangan kebarangkalian terletak pada Lim semasa peringkat pembelaan semasa perbicaraan. Pihak pendakwaan juga berhujah bahawa tiada asas yang sah untuk hakim perbicaraan menolak pendapat SP7 tentang keadaan fikiran Lim pada masa kesalahan tersebut dilakukan.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan pembebasan dan pelepasan Lim dan memerintahkan mahkamah perbicaraan memanggil dan mendengar pembelaan Lim terhadap pertuduhan pembunuhan:

(1) Setelah mendapati bahawa pertuduhan membunuh telah dibuktikan oleh pihak pendakwaan, ia adalah menjadi tanggungjawab hakim perbicaraan untuk mengarahkan Lim menyatakan pembelaannya. Kegagalan untuk berbuat demikian menyebabkan keputusan muktamad hakim bicara cacat (lihat perenggan 21).

(2) Ia adalah terlalu awal bagi hakim perbicaraan untuk menangani keterangan perubatan dan kemudian memerintahkan pembebasan Lim pada penutupan kes pendakwaan. Hakim sepatutnya meneruskan

perbicaraan dan mendengar versi pembelaan. Dengan memberi tumpuan terutamanya kepada pendapat pakar SP7 dan keterangan fakta tentang keadaan yang membawa kepada kematian si mati — yang membawa kepada kesimpulannya mengenainya — hakim perbicaraan telah melakukan kekhilafan undang-undang yang serius yang memerlukan campur tangan rayuan (lihat perenggan 21).

(3) Bagi Lim mendapat pembebasan, hakim perbicaraan, berbekalkan fakta, sepatutnya mempertimbangkan dan menilai dari semua sudut sama ada oleh sebab tidak sempurna akal, Lim tidak dapat mengetahui sifat perbuatannya atau apa yang beliau lakukan sama ada salah atau bertentangan dengan undang-undang. Ini hanya boleh ditentukan pada akhir perbicaraan selepas pihak pembelaan memberi keterangan dan menutup kesnya. Jika Lim memilih untuk berdiam diri dan tidak memanggil sebarang keterangan, beliau akan disabitkan mengikut s 180 KTJ kerana keterangan pihak pendakwaan tidak akan disangkal (lihat perenggan 22–23).

(4) Pada peringkat pendakwaan, pendapat pakar perubatan dianggap sedikit nilai atau signifikan kerana persoalan sama ada Lim tidak dapat mengetahui sifat perbuatannya atau bahawa apa yang beliau lakukan adalah salah atau bertentangan dengan undang-undang adalah perkara yang perlu disimpulkan daripada fakta dan keadaan yang telah terbukti dan bukan daripada pendapat pakar perubatan. Ketidaksempurnaan akal undang-undang bukan untuk diputuskan oleh saksi perubatan, betapapun menonjolnya mereka. Tanggungjawab tersebut terletak pada pihak pembelaan untuk membuktikan kepada mahkamah atas imbangan kebarangkalian. Ia adalah semata-mata persoalan fakta yang terletak pada substratum keterangan lisan, yang kredibilitinya adalah sepenuhnya untuk hakim perbicaraan untuk menentukan selepas penutupan kes pembelaan dengan bantuan keterangan perubatan (lihat perenggan 24).

(5) Di bawah s 84 Kanun Keseksaan, ia hanya ketidaksempurnaan undang-undang mengikut ujian undang-undang — dan bukan hanya keadaan mental seseorang tertuduh mengikut ujian perubatan — yang mengecualikan seseorang daripada tanggungjawab jenayah. Spesie ketidaksempurnaan akal yang ditangani oleh s 84 adalah yang menjejaskan keupayaan kognitif seseorang. Sifat dan takatnya mesti menjadikan pesalah tidak dapat mengetahui sifat perbuatannya atau bahawa apa yang beliau lakukan adalah salah atau bertentangan dengan undang-undang. Beban untuk membuktikan pembelaan kegilaan/ketidaksempurnaan akal terletak pada orang yang membangkitkannya dan piawaian pembuktian adalah pada imbangan kebarangkalian (lihat perenggan 16).]

Cases referred to

John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Kofri Mustafar v PP [2011] 4 MLJ 196; [2010] 9 CLJ 519, CA (refd)
PP v Shalima Bi [2016] 1 MLJ 799; [2016] 2 CLJ 231, CA (refd)

Legislation referred to

Criminal Procedure Code ss 180, 348, 348(1)

Appeal from: Criminal Trial No 45B-12–12 of 2020 (High Court, Kuala Lumpur)

Tan Guat Cheng (GC Tan & Co) for the appellant.
Eyu Ghim Siang (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] The charge preferred against the respondent reads as follows:

> Bahawa kamu pada tarikh 21 Februari 2020 di antara jam 6.30 petang hingga 7.00 malam di No 2700, Jalan lndah 10, Jinjang Utara, di dalam Daerah Sentul, di dalam Wilayah Persekutuan Kuala Lumpur, telah membunuh Lim Poh Ling No KP 820810-14-5396 dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] Dr Saramah bt Mohd Isa ('SP7') a psychiatrist specialist from Bahagia Ulu Kinta Hospital, Tanjung Rambutan, Perak Darul Ridzuan had prepared a medical report ('P42') and certified that the respondent was fit to stand trial and able to defend himself.

[3] When the charge was read and explained to him, the respondent claimed trial to the charge.

[4] In support of its case, the prosecution had called eight witnesses to testify against the respondent.

[5] At the end of the prosecution case, the learned High Court judge acquitted and discharged the respondent without calling on him to make his defence on the ground of unsoundness of mind.

[6] Dissatisfied thereto, the appellant appealed against the said decision.

A THE PROSECUTION'S CASE

[7] The case of the prosecution was well laid out by the learned trial judge in his grounds of judgment which we reproduce below:

B [1] The year 2020 will always be etched in the mind of SP2 as a black mark in his life. Coming back from work, all he wishes to do was to have a relaxing evening at home.

[2] Alas, it was not to be 21 February 2020 was the day he witnessed a brutal attack on his mother, perpetrated by none other than his own uncle, which resulted in her C death.

[3] The unfortunate incident occurred at No 2700, Jalan lndah 10, Jinjang Utara, Sentul Kuala Lumpur which happens to be the deceased's home. The deceased was set upon from behind by the accused who then viciously slashed her using an axe.

D [4] The accused was later arrested on the same day within the vicinity of Jinjang Police Station which he entered while chasing SP2. At that time, he was brandishing an axe and a parang in both his hands.

[5] He was later charged for an offence under s 302 of the Penal Code for the murder of the deceased Lim Poh Liang who happens to be his sister.

E [6] A report from University Malaya Medical Center (UMMC) certified that the accused was suffering and receiving treatment for schizophrenia, from 1995 until he defaulted in 1998.

[7] In April 2022, after he was charged in court and upon the application of his learned counsel, he was sent for observation at Hospital Bahagia Ulu Kinta, Tanjung Rambutan, Perak under s 342 of the Criminal Procedure Code. F

[8] A medical report from the said hospital stated that the accused was fit to stand trial and appreciate the right to enter a plea. When the charge was read and explained to him, he claimed trial.

G [11] The deceased body was identified by SP6 the forensic pathologist who conducted the post mortem on the deceased. SP8 the investigation officer who was present at that time also made a positive identification.

[12] Based on P35 the post mortem report, SP2 who is the deceased's son had also identified the body as that of Lim Poh Liang, the deceased.

H [14] SP6 testified that the course of death as 'multiple slash wounds to the head and neck' (*luka koyak pada kepala dan leher*).

[15] In her report (P35) at pp 3–4 she listed 24 injuries sustained by the deceased under the heading 'KESAN PERLUKAAN DAN KECEDERAAN' and confirmed that these are not self-inflicted injuries or wounds.

I [16] According to SP6 there exist also defensive injuries indicating the deceased was trying to ward off blows from sharp objects. When shown P22(a) a *parang* and P23(a) an axe, SP6 confirms that they are consistent with the nature of the injuries sustained by the deceased.

[24] SP7 a psychiatrist from the said hospital in her oral evidence and her report P42 formed an opinion that the accused:

(a) Encik Lim Poh Teck mengidap penyakit skozofrenia dalam tahap stabil (schizophrenia in remission).

(b) Semasa kejadian seperti yang didakwa pada 21 Februari 2020, beliau berada dalam keadaan mental yang waras dan sedar akan sifat dan akibat daripada perbuatannya serta mampu untuk mengetahui bahawa perbuatan tersebut adalah salah dan bertentangan dari segi undang-undang.

(c) Keadaan mental beliau telah bertambah baik dengan rawatan yang diberi dan adalah stabil pada tarikh laporan ini ditulis. Beliau layak dihadapkan ke mahkamah untuk dibicarakan serta mampu untuk membela diri.

[25] SP7 went on to describe and explain various tests and interviews conducted, which led to her finding and conclusion, during the accused's period of observation at the said hospital which ran from 2 April 2021–18 June 2021, the date P42 was prepared. She also confirmed that Risperidone tablet was prescribed to the accused to treat him.

[26] Her finding at para 23(b) was challenged by the defence. During her cross-examination she agreed that Risperidone tablet was prescribed to the accused as a form of treatment for his mental illness which was diagnosed as suffering from schizophrenia.

[27] SP7 further confirmed that without this treatment, the accused's condition could not be managed and thus would affect his ability to mount his defence in court.

[28] SP7 in her examination-in-chief concluded that the accused was capable of knowing the nature of his act as he was not confused after the incident. This is what SP7 said:

> Saya ada melihat rakaman video yang menunjukkan keadaan OKT semasa beliau sampai ke balai polis. Di mana beliau berseluar pendek dan memegang kapak dan parang di tangan beliau di mana kedua-dua alat ini digunakan oleh beliau sebelum kejadian untuk melakukan pertukangan. Menurut beliau, beliau ada membuat rumah untuk kucing di hadapan rumah sebelum mangsa masuk ke dalam rumah. Peristiwa yang berlaku semasa kejadian sehingga selepas kejadian itu juga telah diceritakan oleh anak mangsa sendiri yang merupakan saksi yang kami dapat melalui panggilan telefon.
>
> TPR: ...
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> Yang Arif, daripada temubual dengan Encik Lim Pao Teck dan juga saksi yang berada di situ iaitu anak tertuduh yang kami dapat, dan juga melihat daripada rakaman video tersebut, kesimpulan yang telah saya lakukan berdasarkan seksyen 84 di mana lepas kejadian beliau merasa terkejut selepas beliau berlakunya kejadian seperti didakwa itu apabila beliau ada orang lain dan mengejar mereka. Kalau ikut maklumat yang saya dapat daripada anak actually mereka mengumpan beliau untuk ikut mereka sampai ke balai polis. Itu maklumat yang saya perolehi. Sebab selepas kejadian anak ada memanggil beberapa orang kawan lagi dan mereka berlari ke balai polis jadi Encik Lim Pao Teck ikut sebab itu sampai ke balai polis. Biasanya jika seseorang individu itu mengalami gangguan mental yang teruk ataupun impact mental capacity

biasanya lepas kejadian yang didakwa, mereka akan macam bingung di mana berdasarkan maklumat yang saya perolehi dan temubual OKT, sorry, dengan Encik Lim Poo Teck, didapati beliau tidak berada dalam keadaan tersebut.

[29] It was on this basis that SP7 formed an opinion that the accused was capable of knowing the nature of his act, thus her reference to s 84 of the Penal Code.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[8] After hearing the evidence of eight prosecution witnesses and the submissions of counsel, the learned trial judge ordered the acquittal and discharge of the respondent without calling for his defence. In his judgment, the learned trial judge stated as follows:

[36] It is clear that even at this stage, the prosecution stage, the accused is relying on the defence of unsoundness of mind as provided under s 84 of the Penal Code.

[37] The finding and conclusion of SP7 that the accused is of a sound mind, capable of knowing the nature of the act, and knows what he is doing is wrong and contrary to law is challenged by the accused's counsel during cross-examination.

[38] SP7 concluded that the accused was capable of knowing the nature of his act as he was not confused after the incident based on a CCTV recording shown to her showing the accused's conduct in the vicinity of Jinjang, police station and telephone conversations she had with SP2, apart from observations and interviews conducted with the accused whilst the accused was in the hospital.

[39] SP4 who was on guard duty at Jinjang police station on the date of the incident in his evidence stated that on that particular day the accused dressed only in short pants came running into the vicinity of the police station, chasing after a group of 7–8 people whilst holding a parang in his right hand and an axe in his left hand. He was acting in an aggressive and threatening manner towards them. SP4 agreed under cross-examination to the term 'mengamuk' as suggested by learned counsel, to describe the accused's condition at that time.

[40] SP7 also admitted that Risperidone tablet was prescribed to the accused as a form of treatment for his mental illness which was diagnosed as suffering from schizophrenia. SP7 admitted, without this treatment, the accused's condition could not be managed and thus would affect his ability to mount his defence in court.

[41] Prior to this incident, the accused was treated at UMMC for schizophrenia as can be seen in P41 a medical report. He was treated from 4 April 1995–18 December 1998 when he defaulted his appointment.

[42] SP2 in his evidence stated that the accused who was staying in the same house was not home when he came back from work and the attack took place approximately ten minutes after that when the deceased walked into the house. According to SP2 the accused suddenly attacked her from behind. He did not hear any conversation between those two prior to the attack.

[43] This piece of evidence is material and relevant as SP7 alleged that during her telephone conversation with SP2, she was informed that prior to the attack, the

accused was at the house, building a cat house for his cat. Both the parang and axe were used in his carpeting work. He was only wearing a short pants, without any shirt on at that time.

[44] The contradiction between SP2 and SP7's version, of what had occurred prior to the attack was never explained by either witness. It would appear that the attack on the deceased was sudden and without any provocation.

[45] Since the evidence of SP 7 is her opinion, it falls upon this court to assess and scrutinise all the evidence available before accepting such opinion

[46] Having scrutinised the evidence of SP7, SP2 and SP4, as discussed above at paras 37, 38, 40–43, and D26 a police report lodged by the deceased on 17 February 2020 stating that the accused has mental problem, I concluded that SP7's opinion regarding the state of mind of the accused at the time of the incident was not supported by sound premises. Therefore, I rejected that part of her opinion.

[47] Based on the evidence adduced by the prosecution, oral and documentary, I find that the accused had, on the balance of probability proved that at the time of the commission of the offence he was of unsound mind and he does not know the nature of his act.

[48] I am satisfied that the accused had caused such injury which lead to the death of the deceased as defined in any one of the limbs under s 302 of the Penal Code.

[49] The accused however, based on reasons stated above, is acquitted and discharged by reason of unsoundness of mind and sent to Hospital Bahagia Ulu Kinta, Tanjung Malim, Perak for further treatment as provided under s 348 of the Criminal Procedure Code.

THE GROUNDS OF APPEAL

[9] Before us, the findings are being attacked on five main grounds which the learned deputy public prosecutor claimed goes to the root of the erroneous acquittal of the respondent:

(1) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila telah melepaskan dan membebaskan dan membebasakan responden di akhir kes pendakwaan tanpa dipanggil untuk membela diri bagi satu pertuduhan di bawah seksyen 302 Kanun Keseksaan dan selanjutnya memerintahkan agar Responden diletakkan dalam jagaan yang selamat di Hospital Bahagia Ulu Kinta, Perak selama yang diperkenankan oleh Duli Yang Maha Mulia Sultan Kelantan menurut peruntukan seksyen 348 Kanun Tatacara Jenayah.

(2) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila di dalam penghakimannya telah memutuskan bahawanya Responden telah ada melakukan perbuatan sepertimana di dalam pertuduhan, namun telah tersalah arah apabila tidak mengarahkan responden untuk dipanggil membela diri.

(3) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila gagal mengarahkan responden untuk membela diri sebaliknya telah memerintahkan agar responden diletakkan dalam jagaan menurut peruntukan seksyen 348 Kanun Tatacara Jenayah di akhir kes pendakwaan. Pembelaan yang akan diwujudkan oleh responden iaitu berada di dalam keadaan mental yang tidak waras dan tidak sedar akan sifat dan akibat perbuatan perlu dibuktikan di akhir kes pembelaan dan bukannya di akhir kes pendakwaan.

(4) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila telah menolak segala keterangan dan bukti-bukti yang dikemukakan oleh pihak pendakwaan terutamanya keterangan daripada SP7 bahawa sajanya responden sewaktu kejadian berada di dalam keadaan yang waras dan sedar akan sifat dan akibat perbuatannya telah membunuh simati.

(5) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila pembelaan ketidakwarasaan (insanity) dibangkitkan maka beban pembuktian terletak ke atas responden bagi membuktikan ketidakwarasan itu selaras dengan peruntukan seksyen 105 Akta Keterangan 1950 dan responden seharusnya dipanggil bagi membela diri bagi membuktikan pembelaan tersebut atas imbangan kebarangkalian. Kedudukan undang-undang mengenai pembelaan ketidakwarasan (defence of insanity) ini telah mantap.

[10] Putting it briefly, the complaint by the appellant arise from the finding made by the learned trial judge at the end of the prosecution's case, where the learned trial judge on 21 December 2021 had opined regarding the issue of unsoundness of mind raised by the respondent (see notes of proceedings at pp 193–194, Vol 19 *RR*:

> Ini keputusan saya, ya. Jadi daripada keterangan yang telah dikemukakan, Mahkamah ini berpuas hati bahawa tindakan ataupun perbuatan OKT telah menyebabkan kecederaan yang mana dalam keadaan biasa telah menyebabkan kematian terhadap Lim Poh Ling iaitu simati dalam kes ini. Rujukan kepada keterangan SP2 dan SP6. Walau bagaimanapun, Mahkamah ini berdasarkan kepada keterangan SP7, P42 dan D26, berpuas hati dan mendapati bahawa tertuduh ketika kejadian tidak mempunyai mental kapasiti dan tidak mengetahui jenis perbuatan yang dikatakan menjadi kesalahan atau apa yang dilakukan olehnya adalah salah atau bertentangan dengan undang-undang iaitu elemen mens rea tertuduh telah gagal dibuktikan oleh pihak pendakwaan.
>
> Oleh itu, saya memutuskan telah gagal untuk membuktikan satu kes prima facie terhadap tertuduh. Tertuduh dengan ini dilepaskan dan dibebaskan dari pertuduhan dan selaras dengan peruntukan di bawah seksyen 348 KTJ tertuduh dengan ini dihantar ke Hospital Bahagia Ulu Kinta untuk rawatan lanjut. Semua ekshibit berbentuk dokumentari untuk simpanan Mahkamah dan lain-lain dikembalikan kepada pihak pendakwaan.

LAW ON INSANITY

[11] The distinction between legal and medical insanity has been explained by the learned authors of *Ratanlal and Dhirajlal's Law of Crimes* 26th Ed in the following terms at p 307:

> 'Medical insanity' and 'legal insanity' — There is a good deal of difference between 'medical insanity' and 'legal insanity' and courts are concerned only with the legal and not the medical aspect of the matter. It is not every kind of frantic humour or something unaccountable in a men's action, that points him out to be a mad man, to be excepted from punishment. It is not mere eccentricity or singularity of manner that would suffice the plea of insanity. Abnormality of mind is not by itself sufficient to show that the accused must have acted while of unsound mind. Such exemption can be claimed only when the insane person is incapable of knowing the nature of the act or he is doing either wrong or contrary to law.

[12] In the case of *Public Prosecutor v Shalima Bi* [2016] 1 MLJ 799; [2016] 2 CLJ 231, the respondent was charged in the High Court at Johor Bahru with murder. She was alleged to have poured hot oil on the deceased, causing her death. She claimed trial to the charge and was acquitted and discharged at the close of the prosecution case without her defence being called. The learned trial judge found that no prima facie case had been established against her as she was insane at the time she committed the act.

[13] Dissatisfied with the decision, the prosecution appealed to the Court of Appeal and succeeded, where upon the respondent was ordered to enter her defence before the same judge. The learned trial judge after duly calling for her defence again acquitted and discharged her, on the same ground that she was insane at the time she committed the act. Pursuant to s 348(1) of the Criminal Procedure Code, he ordered the respondent to be detained at the Tampoi Hospital, Johor Bahru for treatment.

[14] On appeal by the public prosecutor, the Court of Appeal through the judgment delivered by Abdul Rahman Sebli JCA (as he then was) set aside the order of acquittal and discharge, convicted and sentenced her to death.

[15] However, on appeal, the Federal Court unanimously allowed the appellant's appeal and reinstated the orders of the High Court. However, the apex court did not provide a written judgment.

[16] Abdul Hamid Embong JCA (as he then was) in *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509, writing for the Court of Appeal gave his findings regarding the defence of insanity raised by the appellant:

10. The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s 84 of the Penal Code. It states:

> 84 Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

11. This section exempts a person found to be insane of any criminal responsibility if it is found that he is 'incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law' (see commentary in *Ratanlal and Dirajlal's Law of Crimes*, 25th Ed, p 280). The learned authors there further commented that a person 'is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.

12. Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, 25th Ed p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

> It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495; [1998] 1 CLJ 759.

14. When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes*, 5th Ed, p 289 et seq).

15. It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Hussin v Public Prosecutor* [1988] 1 MLJ 537; [1998] 2 CLJ 383 also *Baharom v Public Prosecutor* [1960] 26 MLJ 249; [1960] 1

LNS 9). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see *Public Prosecutor v Misbah bin Saat*). A

16. The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case (*Rajagopal v Public Prosecutor* [1977] 1 MLJ 6; [1976] 1 LNS 122, *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63; [1969] 1 LNS 48). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s 84 of the Penal Code. B

[17] Similarly, the Court of Appeal through the judgment of Suriyadi Halim Omar JCA (as he then was) in *Kofri Mustafar v Public Prosecutor* [2011] 4 MLJ 196; [2010] 9 CLJ 519, when addressing the same provision expressed the same sentiments further said: C

[18] Section 84 of the Penal Code legislates that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Even though the Appellant has alluded to the term 'insane' in his submission, the phrase promulgated in s 84 is 'unsoundness of mind'. 'Insanity' which speaks of 'disease of the mind', is a term used in *Mc Naghten* [1843] 10 Cl & Fin 200 or generally referred to as *Mc Naghten*'s Rule. D E

[19] Section 84 demands that:

(i) at the time of doing it;

(ii) the person by reason of unsoundness of mind; F

(iii) is incapable of knowing;

(iv) the nature of the act; or

(v) that he is doing what is either wrong or contrary to law.

[20] Two limbs entitle him to an acquittal. First, if at the time of doing the act, by reason of unsoundness of mind, he did not know the nature of the act, or if he knew the nature of the act did not know that it was either wrong or contrary to law (*Criminal Law in Singapore and Malaysia Text and Materials* by KL Koh, CMV Clarkson and NA Morgan). For purposes of this appeal, the crucial time of having an unsound mind therefore is at the time of the brutal attack, and not before or after the act (*John Dawlat Moon* [1927] 29 Cr LJ 393; [1928] AIR (P) 363). A plea of unsoundness of mind at the time of trial will not avail an accused person (*Nota Ram* [1866] PR No 56 of 1866; *The Law of Crimes by Ratanlal*, p 165). Regardless of the other relevant prerequisites of s 84, it is incontrovertible that unless this preliminary factor of unsoundness of mind is established first, this defence cannot prevail. G H

[21] It is established law that the burden of proof lies on the Appellant that is if he wishes the court to believe that he was of unsound mind at the time when he committed the offence. Needless to say, this defence of unsound mind needs to be established at the earliest possible moment ie, at the prosecution's stage. This is to avoid any allegation of afterthought. I

[22] Under s 105 of the Evidence Act, the legal burden is on the Appellant to establish the fact that he committed the act in a moment of unsound mind (*Jayasena v R* [1970] 1 All ER 219). In an English case, *Woolmington v Deputy Public Prosecutor* [1935] AC 462 the court reiterated that for a defence of insanity, the legal burden of proof on the balance of probability, is placed on an accused person.

OUR DECISION

[18] The crucial issue which lies at the heart of this appeal is the order of acquittal at the end of the prosecution's case after the learned trial judge had indeed satisfied in his finding that the respondent had committed the act specified in the charge. Despite that finding, the learned trial judge acquitted and discharged the appellant without his defence being called at all. With respect, learned trial judge had patently fell into error by deciding an outright acquittal.

[19] Undoubtedly, his reasons for doing so was based on the considerable weight he had given to the medical testimony of SP7, SP7's medical report (P42) and D26, the deceased Jinjang Police Report No 3469/20 dated 17 February 2020 received in evidence in concluding that the respondent was insane at the time he committed the act. As a result of which, the learned trial judge ordered the respondent to be detained at the Hospital Bahagia Ulu Kinta, Tanjung Malim, Perak for further treatment as provided under s 348 of the Criminal Procedure Code for treatment.

[20] Much had been strenuously canvassed before us by learned counsel for both sides to this important point. The question which arises in our instant appeal is whether it was open for the learned trial judge to order the acquittal at this stage of the trial upon relying on such medical evidence standing alone before the court.

[21] Having being satisfied that the offence of murder had been established by the prosecution, it is incumbent upon the learned trial judge to direct the respondent to state his defence. Failure to do so render his ultimate decision fatally flawed. To our mind, it is premature for him to dealt with the medical situation at this stage. The learned trial judge should refrain from making decision of an acquittal at the close of the case for the prosecution. He should have continued with the trial and hear the defence version. By primarily focusing his judicial mind on SP7's expert opinion and factual evidence as to the circumstances leading to SP2's mother's death, which led to his conclusion thereon, the learned trial judge had fallen into a serious error of law warranting appellate intervention.

[22] For the respondent to earn an acquittal, learned trial judge armed with the facts, will have to consider and evaluate from all angles whether by reason of medical insanity, the respondent was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law only until the end of the trial after the defence has given evidence and close its case. Unfortunately, this did not take place here.

[23] For completeness, however, if the respondent elected to remain silent and called no evidence, the court must convict him since the hypothetical position obtained pursuant to s 180 of the Criminal Procedure Code that the prosecution evidence would not and could not be challenge or rebutted, has become a reality.

[24] In this context, it is pertinent to emphasise that at the prosecution stage, expert medical opinion assumed little value or significance as the question of whether the respondent was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law is a matter to be inferred from the proved facts and circumstances and not from expert medical opinion. Legal insanity is not for the medical witnesses to decide however eminent they may be. That onus is upon the defence and it is to satisfy the court on the balance of probabilities. It is purely a question of fact which rests upon substratum of oral evidence, the credibility of which is entirely for the learned trial judge to determine after the close of the defence's case with the aid of the medical evidence.

CONCLUSION

[25] Having regard to all the foregoing reasons and after a careful scrutiny of the notes of proceedings of the trial and the submissions made, we unanimously allowed the appellant appeal. The orders of acquittal and discharge is set aside. The case to be remitted to the Kuala Lumpur High Court before the same judge for continuation of the trial and the respondent to be called to enter upon his defence. The respondent is to be remanded in prison until trial.

Appeal allowed unanimously, setting aside respondent's acquittal and discharge and ordering the trial court to call for and hear respondent's defence to the murder charge.

Reported by Ashok Kumar